

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Non-Accounting)
Safeguards of Sections 271 and 272)
of the Communications Act of 1934,)
as amended)

CC Docket No. 96-149

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T")
hereby opposes the petitions filed by U S West and BellSouth on February 20, 1997 seeking
reconsideration of the First Report and Order¹ ("Order") in this proceeding .

I. The Plain Language And Purpose Of § 272(b)(1) Forecloses The Relief Sought By
BellSouth's Petition

The Order correctly holds that § 272(b)(1)'s mandate that a § 272 affiliate
"operate independently" imposes specific requirements beyond those mandated by the other
subsections of § 272(b).² To implement § 272(b)(1), the Order prohibits, inter alia, performance
by the § 272 affiliate of operating, installation, and maintenance functions associated with BOC

¹ First Report and Order and Further Notice of Proposed Rulemaking, Implementation of
Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of
1934, as Amended, CC Docket No. 96-149, FCC 96-489, released December 24, 1996
("Order").

² See Order, ¶ 156.

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facilities; as well as performance by the BOC or its other affiliates of operating, installation, and maintenance functions associated with facilities that the § 272 affiliate owns or obtains from a third party.³ BellSouth contends in its petition for reconsideration that the Commission should modify its interpretation of § 272(b)(1) so as to remove the Order's restrictions on the sharing of installation and maintenance functions. It is clear, however, that no reasonable interpretation of that section permits such an outcome.

BellSouth first argues that § 272(b)(1)'s "operate independently" requirement mirrors the language used in the Commission's Computer II and cellular separation rules, and should thus be interpreted consistently with those provisions.⁴ AT&T agrees that the Commission should take account of these prior rules in interpreting § 272(b)(1). However, as demonstrated in AT&T's petition for reconsideration, those rules impose significantly more stringent requirements than the Order's reading of § 271(b)(1).⁵ Indeed, the Order acknowledges that the Commission's rules require a Computer II affiliate to "have its own ... personnel" for installation, maintenance and other functions.⁶ Thus, the Computer II and cellular separation rules not only offer no

³ See id., ¶ 158.

⁴ BellSouth Petition, p. 4 (citing 47 C.F.R. §§ 22.903(b) & 64.702(c)(2)).

⁵ See AT&T Petition For Reconsideration And Clarification, filed February 20, 1997, pp. 8-10 ("AT&T Petition").

⁶ Order, ¶ 171. See also e.g., Memorandum Opinion And Order, American Telephone and Telegraph Company Report On Services To Be Shared Between Fully Separated Subsidiary And Affiliated Companies And Associated Costing Methodology, 92 F.C.C.2d 676, ¶¶ 42-43 (1982) (observing that "operate independently" requirement of 47 C.F.R. § 64.702(c)(2) requires separate personnel, and refusing request to allowing sharing of clerical and other services that would "support the day-to-day operations of the business enterprise....").

support for BellSouth's claims, they actually bolster the arguments made by AT&T and other petitioners that the Commission must strengthen the separation requirements it imposed pursuant to § 271(b)(1).

BellSouth also makes the untenable claim -- already considered and rejected by the Commission⁷ -- that § 272(b)(1) has no independent meaning. Citing the maxim of statutory construction expressio unius est exclusio alterius, BellSouth argues that § 271(b)(1)'s "operate independently" requirement is fully defined by the requirements of sections 272(b)(2) through (b)(5). As a preliminary matter, the structure of § 272(b) offers no support for BellSouth's reading of the statute. Subsections (b)(2) through (b)(5) are not subparts of § 272(b)(1), but rather are separate and distinct "structural and transactional requirements," as provided by § 272(b).⁸ Further, the doctrine of expressio unius holds only that the inclusion of multiple items in a list creates a presumption that items not included were intentionally omitted -- it does not suggest that one item in a statutory list of requirements simply may be disregarded. As the Order holds, the requirement that § 272 affiliates "operate independently" must be interpreted to mandate separation requirements in addition to those imposed in sections 272(b)(2) through (b)(5), else subsection (b)(1) will be rendered surplusage.⁹

⁷ See Order, ¶¶ 156-57.

⁸ 42 U.S.C. § 272(b).

⁹ Cf., e.g., Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.").

The remaining contentions BellSouth offers boil down to the argument that because § 271(b)(1) does not specifically refer to maintenance and installation, it does not prohibit the sharing of those functions. It is clear, however, that the term “operate independently” is not self-executing -- the Commission must implement this requirement. In fact, as AT&T showed in its petition for reconsideration, the plain meaning of “operate independently” requires the Commission to impose restrictions in addition to the extremely limited measures it required in the Order or, alternatively, to clarify that it intended to prohibit BOCs and their § 272 affiliates from integrating other key functions in addition to those specifically referenced in paragraph 158 of the Order.¹⁰

A BOC and its § 272 affiliate that shared installation and maintenance functions could not reasonably be deemed to be “operating independently” as that phrase is ordinarily used. It is equally clear that it would be inconsistent with the plain meaning of § 272(b)(1) for a BOC and its § 272 affiliate to conduct these core functions through a third entity, such as by transferring network maintenance activities to another BOC affiliate. Section 272(b)(1) unequivocally requires independent operation, not merely the maintenance of separate corporate shells. In § 272, Congress provided an extensive set of separation requirements for BOC provision of in-region interexchange services. In light of these stringent restrictions, there is simply no basis for the assertion that the 1996 Act intended or operates to permit a BOC simply

¹⁰ See AT&T Petition, p. 2 n.5. The Order suggests that to the extent a function is an “integral part” of an activity subject to § 272, it “must be conducted through the section 272 affiliate.” *Id.*, ¶ 169.

to create a thinly-staffed entity that nominally has an independent existence, but which in reality obtains all of its services from the BOC or one its corporate affiliates.¹¹

II. Section 272 Also Prohibits BellSouth's Attempt To Expand The Definition of "Marketing" Functions

BellSouth also seeks to undermine § 272's carefully-considered separation requirements by urging that the definition of "marketing and sale of services" under § 272(g) be expanded to include "product development and strategy."¹² As a preliminary matter, BellSouth never offers even a rough definition of what functions "product development and strategy" might include, and so the Commission lacks sufficient information to evaluate its claims. Moreover, although its petition adverts to dictionary definitions of the terms "marketing" and "sales," the definitions it cites do not mention "product development" or "strategy," much less define the scope of those amorphous terms.¹³ BellSouth also asserts that "virtually any modern marketing text" would endorse the ill-defined "definition" it proposes; however, its petition fails to cite a single such text, or to provide any information from them that might shed light on its claims.

As the Order recognized, "marketing and sales" schemes between BOCs and their § 272 affiliates will likely vary widely. In light of this fact, the Commission wisely and explicitly refused to attempt to catalog permissible and impermissible activities: "We see no need at this

¹¹ Cf. Memorandum Opinion And Order, *supra*, note 6, ¶¶ 38-43 (rejecting AT&T's request to provide clerical services to its Computer II affiliate via its Administrative Services Department, an internal division that maintained its own accounting system, because that proposal would "substantially undermine" operational independence).

¹² See BellSouth Petition, pp. 7-10.

¹³ *Id.*, p. 9, nn. 19 & 20.

time to compile an exhaustive list of the specific BOC activities that would be covered by section 272(g). We recognize that such determinations are fact specific and will need to be made on a case-by-case basis.”¹⁴

While it is impossible to determine what functions BellSouth seeks to conduct in conjunction with its § 272 affiliate under the rubric of “marketing,” its petition makes clear that the relief it requests would undermine the regime Congress established in that section. BellSouth urges that “all planning, design and development efforts concerning product development and strategy” must be permitted on an integrated basis.¹⁵ Even indulging, arguendo, the dubious assumption that activities such as product design and development could somehow be regarded as marketing functions in certain contexts, the Commission is here charged with interpreting § 272 so as to give effect to that entire provision. In light of the § 272’s extensive separation requirements -- such as § 271(b)(1)’s unequivocal mandate that BOCs and their § 272 affiliates “operate independently” -- the Commission may not interpret § 272(g)’s limited grant of authority for joint marketing and sales activities so broadly as to permit BOCs and their § 272 affiliates to integrate their operations in a fashion inconsistent with the remainder of that section. BellSouth’s proposal would permit § 272(g) to swallow much of the rest of § 272.

¹⁴ Order, ¶ 296.

¹⁵ BellSouth Petition, p. 8.

III. The Commission Should Deny U S West's Proposed "Clarification" Of Section 272(g)

The Order correctly confirmed that § 271(e)'s restriction on some IXC's ability to "jointly market" resold BOC local service and interLATA services applies only to "activities that take place prior to the customer's decision to subscribe."¹⁶ Accordingly, the Commission held that "once a customer subscribes to both local exchange and interLATA services from a carrier that is subject to the restrictions of § 271(e), that carrier may market new services to [that] existing subscriber."¹⁷ U S West asks the Commission to reconsider its holding by extending § 271(e)'s prohibition to cover a sweeping and poorly-delineated class of IXC's post-sale activities, which it defines only as "packaged offerings" that include a "discount."¹⁸

Whatever the precise activities U S West seeks to prohibit, it is doubtful that they implicate the concerns that prompted Congress to enact § 271(e)(1). After an IXC has won a customer for both local and long distance service under the joint marketing rules established in the Order, the joint marketing restrictions of § 271(e)(1) no longer apply to contacts with that customer. Indeed, the Commission and courts have elsewhere recognized that, in general, joint marketing increases consumer welfare by making available more information and broader choices. If anything, therefore, the Commission should seek to apply the § 271(e)(1) prohibition as narrowly as possible, not expand it beyond its terms and purpose as U S West seeks.

¹⁶ Order, ¶ 281.

¹⁷ Id.

¹⁸ U S West Petition, p. 6.

Even if it were in fact possible, as U S West asserts, to “imagine” post-sale offerings that might violate § 271(e), the Commission’s wisely decided to evaluate IXC marketing efforts on a case-by-case basis, just as it refrained from attempting exhaustively to define permissible BOC joint marketing under § 272(g). As the Order recognizes, marketing programs take many, fact-specific forms, and are best considered on a case-by-case basis.¹⁹

IV. There Is No Basis For The Commission To Reconsider Its Decision That BOCs Must Provide Out-Of-Region Information Services Via A § 272 Affiliate

Both BellSouth and U S West argue that the Commission should reconsider its conclusion that BOCs must provide out-of-region information services via a § 272 affiliate.²⁰ This issue was thoroughly addressed both in comments submitted in this proceeding and in the Order itself.²¹ Both parties simply retrace well-traveled ground, offering no basis on which the Commission might grant the relief they seek.

The parties’ argument presents a straightforward issue of statutory interpretation. Section 272(a)(2) defines the “services for which a separate subsidiary is required.” Section 272(a)(2)(B)(ii) expressly provides that the BOCs themselves may provide certain “out-of-region services.” However, § 272(a)(2)(C) requires that BOCs must utilize an affiliate that complies with the requirements of § 272 in order to provide “interLATA information services, other than

¹⁹ Order, ¶ 282. It is noteworthy, however, that the Commission’s discussion of its decision to review IXC joint marketing pursuant to § 271(e)(1) on a case-by-case basis expressly refers to marketing to “potential customers.” *Id.*

²⁰ See BellSouth, pp. 10-13; U S West, pp. 1-5.

²¹ See, e.g., Order, ¶¶ 83, 87 (stating that BellSouth was the only BOC to raise this issue, and discussing its contentions).

electronic publishing ... and alarm monitoring services” The Order’s conclusion is simple and is grounded in the plain language of the statute: “the explicit exclusion of out-of-region interLATA telecommunications services in one subsection of the statute, and the absence of such an express exclusion of out-of-region interLATA services in another subsection of the same provision, suggests that Congress intended not to exclude the latter from the separate affiliate requirement.”²² U S West concedes that the Commission’s interpretation is “a plausible reading of the statute,”²³ while BellSouth admits that there is no legislative history addressing the subject.²⁴ Plainly, the Commission’s interpretation is the most straightforward and reasonable reading of the statute, and there is no reason to reconsider it here.

²² Order, ¶ 86.

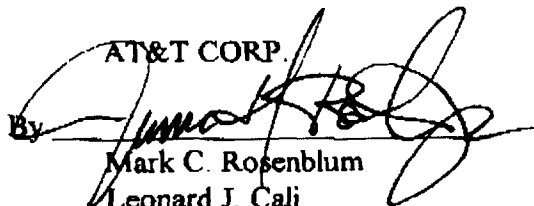
²³ U S West Petition, p. 3; cf. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) .

²⁴ BellSouth Petition, p. 10.

CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for reconsideration of its First Report and Order in CC Docket No. 96-149 filed by U S West and BellSouth.

Respectfully submitted,

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(CC Docket No. 96-149)

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Teleport Communications Group, Inc. ("TCG")

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CERTIFICATE OF SERVICE

I, Terri Yannotta, do hereby certify that on this 21st day of March, 1997, a copy of the foregoing "Opposition To Petitions For Reconsideration" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.



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March 21, 1997

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